FILED

JAN 16 2003

CATHY A. CATTERSON
U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>PAUL ANTHONY DAVIS,<br><br>Defendant-Appellant. | No. 01-56614<br><br>D.C. No. CV-98-01153-JSR<br>CR-92-00687-JSR<br><br>MEMORANDUM* |

Appeal from the United States District Court
for the Southern District of California
John S. Rhoades, District Judge, Presiding

Argued and Submitted December 3, 2002
Pasadena, California

Before: REINHARDT, O'SCANNLAIN and PAEZ, Circuit Judges.

Defendant Paul Anthony Davis ("Davis") appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition challenging his conviction and sentence for being a felon in possession of a firearm in violation of 18 U.S.C. §

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

922(g)(1) and 18 U.S.C. § 924(e)(1) and for possession of a firearm in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

Davis first argues that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), should apply retroactively to his conviction and sentence. Davis contends that under *Apprendi*, he was denied due process of law when the district court enhanced his sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1) without first submitting the issue of the prior conviction to the jury. This argument, however, is foreclosed by our recent decision in *United States v. Sanchez-Cervantes*, 282 F.3d 664, 667-68 (9th Cir. 2002). There, we held that *Apprendi* does not apply retroactively on collateral review.

Next, Davis contends that independent of *Apprendi* it was reversible error to apply the ACCA because the prior convictions necessary for sentencing under the ACCA were not alleged in the indictment or proven to the jury beyond a reasonable doubt. We considered this same argument in *United States v. Tighe*, 266 F.3d 1187, 1191 (9th Cir. 2001), and rejected it. In *Tighe*, we held that the three previous convictions for a violent felony or a serious drug offense need not be alleged in a felon-in-possession § 924(g) prosecution where the sentence is later imposed under § 924(e)(1). *Id*. at 1191 ("Under the current state of the law,

the Constitution does not require prior convictions that increase a statutory penalty to be charged in the indictment and proved before a jury beyond a reasonable doubt."); *see also United States v. Summers*, 268 F.3d 683, 688-89 (9th Cir. 2001).

*Jones v. United States*, 526 U.S. 227 (1999), and *Castillo v. United States*, 530 U.S. 120 (2000), do not support a contrary result. Recidivism factors have been deemed traditional sentencing enhancements. 526 U.S. at 249; 530 U.S. at 128. Neither case supports Davis' argument that the ACCA is a separate crime with elements that must be proven beyond a reasonable doubt rather than a sentencing enhancement that need not be presented to the jury.

AFFIRMED